In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 556

LOUISE MCINTYRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After waiving trial by jury (Pet. App. 11; 1 R. 8; 2 R. 2-5) [1] petitioner was convicted in the United District Court for the District of Oregon on a one-count indictment charging the knowing receipt and concealment of illegally imported heroin, with knowledge of its illegal importation, in violation of 21 U.S.C.

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[1] "R." preceded by volume number designates the two-volume record on file with the Clerk.

174 (1 R. 1). On September 21, 1966, petitioner was sentenced to five years' imprisonment, the minimum term permitted by the statute (Pet. App. 18; 1 R. 13). The court of appeals affirmed, *per curiam* (Pet. App. 9).

Petitioner challenges the constitutional validity of the statutory presumption created by 21 U.S.C. 174,[2] and, alternatively, urges that it can have no probative force in cases, such as this, where the dedendant has testified in her own defense at trial. Neither of these claims—each fully considered and rejected by the court of appeals (see Pet. App. 9-10) —warrants further review in this Court.

The constitutionality of the presumption described in 21 U.S.C. 174 has long been firmly established. See, *e.g.*, *Yee Hem* v. *United States*, 268 U.S. 178; *Brown* v. *United States*, 372 F.2d 478, 479 (C.A. 9); *Lujan* v. *United States*, 348 F.2d 156, 157 (C.A. 10), certiorari denied, 382 U.S. 889; *Jefferson* v. *United States*, 340 F.2d 193, 199 (C.A. 9), certiorari denied, 381 U.S. 928; *United States* v. *Stadter*, 336 F.2d 326, 330 (C.A. 2), certiorari denied, 380 U.S. 945; cf. *United States* v. *Gainey*, 380 U.S. 63, 64-65. Petitioner submits no reasons for departing from these settled prec-

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[2] 21 U.S.C. 174 thus provides in pertinent part:

> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

edents which have not already been canvassed and rejected by the lower courts.[3]

The fact that petitioner testified in her own defense does not detract from the rationality of the statutory presumption. The government's case showed that, incident to her arrest under a warrant, heroin was found in a handbag in petitioner's apartment (2 R. 11-13, 15, 18, 20-24, 34-35, 71). In her trial testimony, petitioner admitted possession of the heroin, but stated that she did not import the drugs and did not believe that they were imported (2 R. 50-51; 2 R. 7). On cross-examination, she refused, on Fifth Amendment grounds, to explain how the drugs came into her possession and how long she had been dealing in heroin (2 R. 52-53, 59). The trial judge who "observed the manner and the demeanor of [petitioner] while she was on the witness stand" rejected her testimony as "unimpressive" and relied on the statutory inference in finding her guilty (Pet. App. 13; I R. 10). The presumption applies unless possession is explained to the satisfaction of the trier of the fact. A defendant does not satisfactorily explain possession

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[3] *Erwing* v. *United States*, 323 F.2d 674, is inapposite. There the court of appeals held that the statutory inference was inapplicable to "cocaine hydrochloride" where uncontradicted expert testimony at trial established that such drug was not imported, but was wholly produced in this country (see 323 F.2d at 677-679, 682). In this case, there was no evidence—except for petitioner's own conclusory allegations—challenging the rationality of the presumption as here applied to heroin. See *United States* v. *Sorenson*, 330 F.2d 1018, 1021 (C.A. 2), certiorari denied, 380 U.S. 945; *United States* v. *Coke*, 364 F.2d 484, 485-486 (C.A. 2).

by the simple device of stating, without any factual support, that he did not import the narcotics and did not believe the narcotics were imported into this country. The trier of the facts was under no necessity of crediting the testimony offered in this case. See *United States* v. *Gibson*, 310 F.2d 79, 82 (C.A. 2); *United States* v. *Norton*, 310 F.2d 718 (C.A. 2).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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